TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 529

MARIE DESYLVA, PETITIONER,

vs.

MARIE BALLENTINE, AS GUARDIAN OF THE ESTATE OF STEPHEN WILLIAM BALLENTINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1955

CERTIORARI GRANTED JANUARY 9, 1956

No. 13880

United States
Court of Appeals
for the Ninth Circuit

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellant,

vs.

MARIE DeSYLVA, Appellee.

MARIE DeSYLVA, Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant and Cross-Appellee:

FINK, LEVINTHAL & KENT,

6253 Hollywood Boulevard,
Los Angeles 28, Calif.

For Appellee and Cross-Appellant:

PAT A. McCORMICK,
PATRICK D. HORGAN,

905 Van Nuys Bldg.,
210 West Seventh St.,
Los Angeles 14, Calif. [1*]

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* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United State District Court for the Southern District of California, Central Division

No. 14400-T

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE, Plaintiff,

vs.

MARIE DeSYLVA, Defendant.

COMPLAINT FOR DECLARATORY RELIEF UNDER THE COPYRIGHT LAW

Marie Ballentine files this Complaint under the Federal Declaratory Judgments Act, Section 2201 of Title 28, United States Codes, against the defendant, Marie DeSylva, and avers:

I.

This action arises under the Copyright Laws of the United States, U.S.C. Title 17, as hereinafter more fully appears, and jurisdiction is founded upon U.S.C. Title 28, Section 1338 (a). An interpretation by this Court of Section 24 of Title 17, U.S.C., will be required for a determination of this action.

II.

This is an action for a declaratory judgment as authorized by Section 2201 of Title 28, U.S.C., and is brought because [2] there is an actual controversy now existing between the parties to the above

entitled action as to which plaintiff seeks the judgment of this Court.

III.

Marie Ballentine is the mother and duly appointed and qualified Guardian of the Estate of Stephen William Ballentine, a Minor. Said Stephen William Ballentine is the son of George G. DeSylva, deceased, who died July 11, 1950. Defendant, Marie DeSylva, is the widow of said decedent.

IV.

That during his lifetime, said decedent, either by himself or in collaboration with others, was the author and composer of many musical works; that a great many of said musical works were copyrighted during the last 28 years of said decedent's life and said decedent was part or sole owner of said copyrights; that plaintiff is ignorant of the exact number and titles of all of said works but a partial list is attached hereto, marked Exhibit "A" and by this reference is incorporated herein as if set forth in full. Plaintiff is informed and believes and therefore alleges that the names, dates of copyright and titles of all works in which said decedent held a proprietary or copyright interest, as well as the exact nature and extent of such proprietary or copyright interest, are well known to defendant.

V.

That since the death of said decedent, a number of said copyrights have been renewed in the name of defendant. That the titles of said works are un-

known to plaintiff but well known to defendant. That in the future, the balance of said copyrights on musical works written within the last 28 years of decedent's life [3] will come up for renewal.

VI.

That an actual and bona fide dispute has arisen between plaintiff and defendant in connection with such musical works copyrighted during the last 28 years of decedent's life, as follows:

Plaintiff contends, in accordance with Title 17, Section 24, U.S.C., that upon the death of decedent, defendant and Stephen William Ballentine became equally entitled to the renewals and extensions thereafter made of said copyrights; that defendant became trustee for Stephen William Ballentine of any such renewals and extensions taken out in the name of defendant; that defendant should account to Stephen William Ballentine for all moneys and benefits obtained by defendant as a result of such renewals and extensions.

Plaintiff is informed and believes and therefore alleges that defendant contends that Stephen William Ballentine has no rights whatsoever in and to the musical compositions of George G. DeSylva, deceased, or in and to the renewals and extensions of copyrights on any of such works or in and to any of the moneys or benefits derived from said renewals and extensions of copyrights effected since the death of said decedent; that the defendant does not hold any renewals and extensions of copyrights, or any part thereof, in trust for Stephen

William Ballentine and does not have to account to Stephen William Ballentine for any moneys or benefits derived therefrom.

VII.

That demand has been made upon defendant by plaintiff for an accounting and payment of moneys and benefits derived as a result of the renewals and extensions of the aforesaid copyrights obtained by defendant since the death of decedent, but [4] said demand has been refused by defendant. That plaintiff is ignorant of the amount of moneys and other benefits derived by defendant as a result of said renewals and extensions and an accounting by defendant of said moneys and benefits is necessary to protect the rights of said minor.

Wherefore, plaintiff prays this Court for judgment as follows:

1. For a declaration of the respective rights and duties of the parties with respect to the subject matter of this action;

2. That it be declared that Stephen William Ballentine has equal rights with defendant in and to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and which renewals and extensions were or will be obtained after the death of said decedent; that, in addition, it be declared that defendant holds, as trustee for Stephen William Ballentine, one-half of any such renewals and extensions of such copyrights obtained by her;

3. That defendant be ordered and directed to

account to plaintiff, for the benefit of Stephen William Ballentine, for one-half of all moneys and benefits obtained as a result of said extensions and renewals obtained by defendant since the death of decedent, and, further, that defendant be ordered and directed to pay such sums and transfer such benefits to plaintiff for the benefit of Stephen William Ballentine;

4. That plaintiff recover from defendant plaintiff's costs incurred in this action; [5]

5. That defendant be ordered to pay reasonable attorney's fees to be allowed by this Court;

6. For such other and further relief as this Court may deem proper.

FINK, LEVINTHAL & KENT
/s/ By LEON E. KENT,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 8, 1952. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

To Plaintiff and Her Attorneys:

Please take notice that on the 20th day of October, 1952, at the hour of ten o'clock a.m., or as soon thereafter as defendant's counsel may be heard, defendant will move the above entitled Court in the Courtroom of the Honorable Ernest A. Tolin, Judge of said Court, in the United States Post

Office and Courthouse Building at Los Angeles, California, in accordance with the attached motions, (1) to dismiss the complaint; (2) to strike certain matters from the complaint; (4) for enlargement of time.

Dated this 22nd day of September, 1952.

PAT A. McCORMICK and
PATRICK D. HORGAN,
/s/ By PAT A. McCORMICK,
Attorneys for Defendant. [13]

Motion No. One (To Dismiss the Complaint)

Defendant moves to dismiss the complaint herein on the ground that the same fails to state a claim against said defendant upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[Endorsed]: Filed Sept. 22, 1952. [14]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS.

* * * * *

In view of the absence of a specific case dealing directly with the problem here presented, perhaps the most authoritative viewpoint on the problem is that of the Legal Department of the Copyright

Office. This is set forth in a letter sent to counsel for plaintiff on September 5, 1952 by George D. Cary, Principal Legal Advisor to the Copyright Office. A similar letter was sent to counsel for defendant. The pertinent portions of that letter follow:

"It has always been the position of the Copyright Office, as expressed in our information circulars [32] and correspondence, that a deceased author's widow and children are to be regarded as a single class for renewal purposes, and that the widow takes no precedence over the children in asserting renewal claims. While the instructions appearing on page 2(a) of Form R may not make this clear, the fact that the widow and the children are treated as separate, in stating the language to be used for asserting renewal claims, should not be interpreted as an implication that the one is to be preferred over the other. Our Circular 15 treats them as a single renewal category.

"We express this position in daily practice by accepting the renewal claims of an author's widow, and those of his children, on the same application. It is perhaps significant, in this connection, to note that if we regard two claims as basically conflicting, we will register them, but not on the same application. Likewise, we raise no question concerning joint widow-children claims and register them without correspondence. This differs from cases where a claim is asserted contradicting one which has already been registered, since we make a practice of

requesting an explanation in such instances, before proceeding with entry of the inconsistent claim.

"This is not to say that we regard our position as the only possible one, or that we rule out the possibility that a court may adopt the opposite position. However, we do feel that, in the absence of any direct authority, our present position is more probably correct. Likewise, it accords with our rule of registering claims in doubtful cases [33] since, if we adopted the opposite conclusion, we would be forced to reject outright the entry of certain claims.

"There is no direct authority on this point, although the commentators seem to be in general agreement that the widow and children are to be regarded as a single class, and are to hold the benefits of the renewal as tenants in common. Concededly, the language of the statute is not without ambiguity, although perhaps the more persuasive construction would seem to treat the claimants as one group. On the other hand, at least one aspect of the legislative history of the provision appears to support our position. The present language of the Section was substituted for that used in an earlier draft of the statute, which read: '* * * that the copyright * * * may be further renewed and extended by his widow, or in her default or if no widow survive him, by his children.' The fact that this specific provision was dropped in favor of the present language could imply an intention to group the widow and children together."

* * * * * [34]

Respectfully submitted,

FINK, LEVINTHAL & KENT
/s/ By LEON E. KENT

* * * * * [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed October 16, 1952.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter have regularly come before me for hearing pursuant to a Notice of Motion to Dismiss, on the 20th day of October, 1952, and such hearing having been had and the matter submitted to the Court for decision.

It is hereby ordered, that defendant's motion to dismiss the above entitled action is denied, and defendant shall have twenty days within which to answer.

Dated, this 16th day of December. 1952.

/s/ ERNEST A. TOLIN,
Judge.

[Endorsed]: Filed Dec. 16, 1952. [37]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Marie DeSylva and, for answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Answering paragraph III thereof, defendant admits only that the George G. DeSylva mentioned therein died July 11, 1950, and that defendant is the widow of said decedent, and alleges that she is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in said paragraph III.

II.

Answering paragraph VI of said complaint, defendant admits the allegations therein contained, but alleges that said paragraph does not fully state the contention of defendant; that in addition to the statement of plaintiff as to defendant's contention, [38] appearing in said paragraph beginning with the words "plaintiff is informed and believes" and ending with the words "benefits derived therefrom" (lines 16 through 26, page 3), defendant further contends that the said Stephen William Ballentine is not a child of George G. DeSylva, deceased, within the meaning of Section 24, Title 17, United States Code; and defendant further contends that, even if the said Stephen William Ballentine were

a child of the said George G. DeSylva, deceased, within the meaning of said statute, the defendant does not hold any renewals or extensions of copyrights, or any part thereof, in trust for said Stephen William Ballentine in accordance with said Section 24, Title 17, United States Code, and does not have to account to said Stephen William Ballentine for any moneys or benefits derived from said renewals or extensions in accordance with said Section 24, Title 17, United States Code; and defendant further contends that she is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

III.

Answering paragraph VII, defendant admits only that a demand for an accounting has been made upon defendant by plaintiff and has been refused by defendant, and denies each and every other allegation contained in said paragraph, and further alleges that plaintiff is not entitled to an accounting herein.

IV.

Defendant further alleges that plaintiff is well able to pay her own attorney's fees herein.

Wherefore, defendant prays this Court for judgment as follows:

(1) For a declaration of the respective rights and duties of the parties with respect to the subject matter of this [39] action;

(2) That it be declared that defendant Marie DeSylva is the sole owner of the renewals and exten-

sions of all copyrights in which George G. DeSylva, deceased, had an interest;

(3) That defendant recover from plaintiff defendant's costs incurred in this action;

(4) That plaintiff be ordered to pay reasonable attorney's fees to defendant, to be allowed by this Court;

(5) For such other and further relief as this Court may deem proper.

PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PAT A. McCORMICK,
Attorneys for Defendant. [40]

Duly Verified. [41]

Affidavit of Service by Mail attached.

[Endorsed]; Filed Jan. 7, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Defendant, Marie DeSylva, and to Pat A. McCormick and Patrick D. Horgan, Her Attorneys:

Please take notice, that on the 16th day of March, 1953, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will move the above entitled Court, at the Court Room of the Honorable Ernest A. Tolin, Judge of said Court in the United States Post Office and

Court House Building, at Los Angeles, California, for an order under Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of plaintiff, and for such other and different relief as the Court may deem just and proper in the premises.

Said motion will be made upon the grounds that there is no genuine issue as to any material fact in connection with the relief sought and that under the undisputed facts, plaintiff is [42] entitled to judgment as a matter of law.

Said motion will be made and based upon this notice of motion, the affidavit of Leon E. Kent in support thereof, the statement of undisputed facts filed herewith, the memorandum of points and authorities in support thereof, and upon the pleadings, files, records and proceedings heretofore had herein.

Dated: March 2, 1953.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Plaitniff.

[Endorsed]: Filed March 6, 1953. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF LEON E. KENT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Leon E. Kent, being duly sworn, deposes and states:

That he is one of the attorneys for plaintiff in the above entitled action. That he makes this affidavit in support of plaintiff's application for summary judgment. That affiant has personal knowledge of the facts set forth herein.

That affiant was one of the attorneys for plaintiff, Stephen William Ballentine, and for Marie Ballentine, in an action entitled DeSylva vs. Ballentine, No. 527799, filed in the Superior Court, County of Los Angeles, State of California, as well as in connection with the Matter of the Estate of George G. DeSylva, Deceased, No. 308787, probated in the Superior Court, County of Los Angeles, State of California. That in said actions, there [44] are filed documents signed by decedent, George G. DeSylva, before competent witnesses, in which documents said decedent acknowledged that plaintiff, Stephen William Ballentine, was his son. That said documents include the following, excerpts from which are attached hereto and made a part hereof by this reference:

1. Will, dated April 10, 1947, filed in the aforesaid probate proceeding.

2. Original complaint filed in the aforesaid Superior Court action.

3. Amended complaint in said action.

4. Answer to cross-complaint filed in said Superior Court action.

5. Affidavit of George G. DeSylva, dated April 20, 1947, filed in said Superior Court action.

That the aforesaid acknowledgments are acknowledgments within the meaning of Section 255 of the Probate Code of the State of California.

That in the aforesaid Superior Court action, George G. DeSylva and defendant herein, Marie DeSylva, were initially plaintiffs. That in subsequent proceedings, said Marie DeSylva was subsequenlty and voluntarily dismissed as a party.

That plaintiff, Stephen William Ballentine and Stephen William Moskovita are one and the same person, and that said minor has at times also been known as Stephen William DeSylva.

/s/ LEON E. KENT

Subscribed and sworn to before me this 2nd day of March, 1953.

[Seal] /s/ BERNICE L. LUNDIN,
Notary Public in and for said County and State.

The following are excerpts from documents referred to in the foregoing affidavit.

1. The Will of George G. DeSylva, dated April 10, 1947, signed by George G. DeSylva and wit-

nessed by Wilma Montgomery, Harriet Hamilton and Lazare F. Bernhard, contains the following:

"Article One

I declare that I am married, that my wife's name is Marie DeSylva, and that we have no children the issue of this marriage. I further declare that my wife has a son by a former marriage, namely, David Shelley, born July 18, 1916; that I have a son, namely, Stephen William Moskovita, born March 10, 1944; and that neither my wife nor I have any other children, either living or deceased."

2. The original complaint, subscribed to by the decedent, George G. DeSylva, before a notary public, in the case of DeSylva vs. Ballentine, No. 527799, Superior Court, County of Los Angeles, State of California, contains the following in paragraph II thereof:

"Plaintiff, George G. DeSylva, is informed and believes and therefore alleges that he is the father of said infant."

3. In the amended complaint in said Superior Court action signed by said George G. DeSylva before a notary public, said George G. DeSylva stated in part that he was:

"informed by the defendant Marie Ballentine and therefore alleges upon information and belief that he is the father of said infant."

4. In the answer to the cross-complaint in said Superior Court action signed by said George G.

DeSylva before a notary public, said George G. DeSylva stated:

> "Cross-defendant is informed by the cross-complainant [46] and therefore upon information and belief admits that he is the father of said infant."

5. In a document entitled "Opposing Affidavit of George G. DeSylva", signed by said George G. DeSylva before a notary public, bearing date of April 20, 1947 and filed in said Superior Court action, said George G. DeSylva made the following statements:

> "On the other hand I am perfectly willing and have been willing to provide a reasonable sum in the court's sound discretion for the support and maintenance of my son."

and further

> "I am a resident of this state and have been for more than 10 years. My health is critical and I intend to remain in California and meet all my obligations including the support of my infant son."

That in referring to his son in said affidavit said George G. DeSylva was referring to said Stephen William Ballentine.

I hereby affirm that the foregoing are true excerpts taken from Will of George G. DeSylva, on file in the Matter of the Estate of George G. DeSylva, deceased, No. 308787, and from the pleadings and documents on file in the case of DeSylva vs.

Ballentine, No. 527799, in the Superior Court, County of Los Angeles, State of California.

/s/ LEON E. KENT

Subscribed and sworn to before me this 2nd day of March, 1953.

[Seal] /s/ BERNICE L. LUNDIN,
Notary Public in and for the State of California, County of Los Angeles. [47]

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

STIPULATION RE STATEMENT OF FACTS

It is hereby stipulated by and between the parties hereto, through their respective counsel, that for the purposes of the above entitled action, the following facts may be deemed by the Court to be established.

1. That Stephen William Ballentine is the son of George G. DeSylva, Deceased, and of Marie Ballentine.

2. That said George G. DeSylva and Marie Ballentine were not married at the time of the birth of said Stephen William Ballentine, or at any other time.

Dated: January 20, 1953.

FINK, LEVINTHAL & KENT
/s/ By LEON E. KENT,
Attorneys for Plaintiff.
PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PATRICK D. HORGAN,
Attorneys for Defendant.

[Endorsed]: Filed March 6, 1953. [59]

[Title of District Court and Cause.]

STATEMENT OF UNDISPUTED FACTS

Plaintiff contends that the following are material facts which exist without substantial controversy:

1. George G. DeSylva was the author of many musical works on which he obtained copyrights in his lifetime and said George D. DeSylva died July 11, 1950. Defendant, Marie DeSylva, is the widow of said decedent.

2. Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and was born on March 10, 1944.

3. That since the death of decedent, a number of copyrights taken out in his name have been renewed in the name of defendant. That in the future, the balance of the copyrights of defendant's musical works written within the last twenty-eight years of defendant's life will come up for renewal. [56]

4. That defendant has in her possession or avail-

able to her full and complete records of all the copyrights taken out by decedent and those already renewed in defendant's name, as well as of money received by defendant on account of said renewals.

5. That decedent and the mother of said child, Marie Ballentine, were not husband and wife at the times of the conception and birth of said child.

6. That the decedent during his lifetime acknowledged in writing the said child to be his own. That said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California. That among such acknowledgments are the following:

a. That by Will dated April 10, 1947, and signed by decedent before Wilma Montgomery, Harriet Hamilton and Lazare F. Bernhard, decedent acknowledged plaintiff to be his son, as follows:

> "I declare that I am married, that my wife's name is Marie De Sylva, and that we have no children the issue of this marriage. I further declare that my wife has a son by a former marriage, namely, David Shelley, born July 18, 1916; that I have a son, namely, Stephen William Moskovita, born March 10, 1944; and that neither my wife nor I have any other children, either living or deceased."

In addition, at numerous places in said Will plaintiff was referred to by decedent as his son. In addition, in the Codicils to said Will, dated July 3, 1947,

and March 25, 1948, each signed by decedent in the presence of three witnesses, decedent referred to plaintiff as his son. That said Will and Codicils were offered for probate by defendant herein and were probated as the Last Will and Testament in the Estate of George G. DeSylva, Deceased, No. 308787 of the files of the Probate Court, County of Los Angeles, [57] State of California.

b. In the original complaint filed in the case of DeSylva vs. Ballentine, et al., No. 527799 of the files of the Superior Court of the County of Los Angeles, which complaint was sworn and subscribed to by decedent before a notary public on April 4, 1947, decendent stated on information and belief that he was the father of the plaintiff herein.

c. Similar statements were made in the amended complaint, the answer to the cross-complaint and the second amended complaint, all filed in said action and all subscribed and sworn to by decedent before a notary public.

d. In an affidavit subscribed and sworn to on April 20, 1947, by decendent before a notary public and filed in said action, decedent referred to plaintiff herein as his son.

e. In his written deposition taken in the said action and subscribed and sworn to on September 7, 1947, before a notary public, decedent stated in substance as follows: That he was the father of plaintiff herein as far as he knows; that he has accepted said child as his own; that he deals with this child as his own child; that he has no other

children; that he wants the child to know that he is the father; that he would like to treat the child as a son and wants the child very much to treat him as a father.

Dated: March 2, 1953.

FINK, LEVINTHAL & KENT,
/s/ By LEON E. KENT,
Attorneys for Plaintiff [58]

[Endorsed]: Filed March 6, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Plaintiff, Marie Ballentine, as guardian of the estate of Stephen William Ballentine, and to Fink, Levinthal & Kent, her attorneys:

Please Take Notice that on the 27th day of April, 1953, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will move the above entitled Court, in the courtroom of the Honorable Ernest A. Tolin, Judge of said Court, on the second floor of the United States Post Office and Court House Building, at Los Angeles, California, for an order under Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in favor of the defendant, and for such other and further relief as the Court may deem just and proper in the premises.

Said motion will be made upon the grounds that there is [60] no genuine issue as to any material fact in connection with the relief sought and that, under the undisputed facts, defendant is entitled to judgment as a matter of law.

Said motion will be made and based upon this notice of motion, such affidavits as may be hereafter filed with respect to said motion, the memorandum of points and authorities in support thereof and such further memoranda of points and authorities to be submitted herein, and upon the pleadings, files, records, and proceedings heretofore had herein.

Dated this 12th day of March, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PAT A. McCORMICK,
Attorneys for Defendant [61]

Affidavit of Pat A. McCormick in support of defendant's motion for summary judgment and in opposition to plaintiff's motion for summary judgment.

State of California,
County of Los Angeles—ss.

Pat A. McCormick, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled proceedings and that he makes this affidavit in support of defendant's motion for summary judgment and in

opposition to plaintiff's motion for summary judgment;

Affiant is informed and believes and, upon such information and belief, alleges that with respect to the relationship between Marie Ballentine and defendant's deceased husband, George G. DeSylva, it is true that at no time prior to, at the time of, or subsequent to the birth of the minor child herein, Stephen William Ballentine, were the said Marie Ballentine and the said George G. DeSylva, nor at any of said times did they bear the [63] relationship of husband and wife toward each other;

Affiant further states that he is the attorney for the executors of the Estate of George G. DeSylva, deceased, which said estate is presently under administration in the Superior Court of the State of California, in and for the County of Los Angeles, and that heretofore, and during the administration of said estate, various and sundry proceedings in law and equity have been filed against said executors and said estate on behalf of the said minor child herein, all of which said proceedings have since been determined by way of compromise and settlement, and under the terms of which said compromise and settlement the said minor child has received from said estate the total sum of approximately $99,000.00, and that further under the provisions of said compromise and settlement said funds are presently being administered by a trustee in favor of said minor child.

/s/ PAT A. McCORMICK.

Subscribed and sworn to before me this 12th day of March, 1953.

[Seal] /s/ M. R. STAFFORD,
Notary Public in and for the County of Los Angeles, State of California. [64]

Affidavit of Service by Mail attached. [65]

[Endorsed]: Filed March 17, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF LEON E. KENT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Leon E. Kent, being duly sworn, deposes and states:

That at the hearing on April 14, 1953, on the argument with respect to plaintiff's and defendant's motions for summary judgment, the Court granted leave to file this affidavit and any other papers necessary in the opinion of counsel for the purpose of completing the record.

In connection with the aforesaid motions, affiant states as follows:

1. Affiant refers to and incorporates by this reference the affidavits of Leon E. Kent, dated March 2, 1953, and March 13, 1953.

2. That the present affidavit was not previously

filed [54] because affiant believes the undisputed facts as heretofore set forth in the record justified granting of summary judgment for plaintiff.

3. As a matter of precaution and in the event the Court does not wish to hold at this time that the word "child," as used in the Copyright Act, includes any offspring of the author or at least an illegitimate child acknowledged in accordance with Section 255 of the Probate Code of the State of California, then and in that event, there would be an issue of fact which must be tried in the case. That issue of fact concerns the question of whether the plaintiff is a fully legitimated child under Section 230 of the Civil Code of the State of California.

4. Affiant is informed and believes and therefore alleges that plaintiff is a fully legitimated child within the meaning of Section 230 of the Civil Code of the State of California, and that the evidence adduced at a trial would establish such fact. That affiant can competently testify from knowledge with respect to the fact that the decedent publicly acknowledged plaintiff as his own child and received plaintiff into his family and otherwise treated plaintiff as if he were a legitimate child.

Wherefore, affiant prays that summary judgment be granted to plaintiff as prayer for, but, in the event plaintiff's motion for summary judgment be denied, then that the cause be set for trial.

/s/ LEON E. KENT.

Subscribed and sworn to before me this 17th day of April, 1953.

[Seal] /s/ BERNICE L. LUNDIN
Notary Public in and for said County and State.

Affidavit of Service by Mail attached. [86]

[Endorsed]: Filed April 20, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUMMARY JUDGMENT

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent, by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, by Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows: [89]

Findings of Fact

I.

George G. DeSylva was the owner of many musical works on which he obtained copyrights in his lifetime, and said George G. DeSylva died July 11,

1950. Defendant Marie DeSylva is the widow of said decedent.

II.

Plaintiff, Stephen William Ballentine, also known as Stephen William Moskovita, is the son of George G. DeSylva and was born on March 10, 1944.

III.

That Marie Ballentine is the mother of said child and that decedent and said Marie Ballentine were not husband and wife at the times of the conception and birth of the said child.

IV.

That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California.

V.

That since the death of decedent a number of copyrights taken out in his name have been renewed in the name of defendant. That in the future, the balance of the copyrights of decedent's musical works, written within the last twenty-eight years of decedent's life, will come up for renewal. [90]

VI.

That demand has been made upon defendant by plaintiff for an accounting of moneys and benefits

derived by defendant as a result of said renewals in defendant's name; that said demand has been refused by defendant.

VII.

That an actual and bona fide dispute has arisen between plaintiff and defendant with respect to their respective rights in the musical works copyrighted during the last twenty-eight years of decedent's life.

VIII.

That an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as moneys received therefrom, is not necessary.

IX.

That the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest.

Conclusions of Law

From the foregoing facts, the Court makes its Conclusions of Law as follows:

That defendant is entitled to judgment herein as follows:

(1) That it be declared, determined and adjudged by this Court that, in accordance with Section 24 of [91] Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and ex-

tensions of all copyrights in which George G. DeSylva, deceased, had an interest.

(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights.

(3) That the plantiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive.

(4) That defendant is entitled to judgment for costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated this 29th day of April, 1953.

/s/ ERNEST A. TOLIN,
United States District Judge

[Endorsed]: Filed April 29, 1953. [92]

In the United States District Court in and for the Southern District of California, Central Division

No. 14-400-T

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,
Plaintiff,

vs.

MARIE DeSYLVA, Defendant.

JUDGMENT

The above entitled cause came on regularly for hearing on the 10th and 14th days of April, 1953, before the Honorable Ernest A. Tolin, Judge presiding, on defendant's motion for summary judgment, Fink, Levinthal & Kent, by Leon E. Kent, appearing as counsel for plaintiff, and Pat A. McCormick and Patrick D. Horgan, by Pat A. McCormick, appearing as counsel for defendant, and the Court having examined the documents and proof offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions [93] of Law on Summary Judgment, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That, in accordance with Section 24 of Title 17, United States Code, so long as defendant Marie DeSylva is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest;

2. That the plaintiff herein has no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, nor is plaintiff entitled to an accounting as to any such renewals or extensions of copyrights in the future so long as said defendant is alive;

3. That defendant is awarded her costs and disbursements incurred or expended herein in the sum of $.....

The Clerk is ordered to enter this Judgment.

Dated: This 29th day of April, 1953.

/s/ ERNEST A. TOLIN,
United States District Judge

[Endorsed]: Flied April 29, 1953. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the clerk of the above entitled court and to defendant, Marie DeSylva, and Pat A. McCormick and Patrick D. Horgan, her attorneys:

Notice Is Hereby Given that Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on April 29, 1953.

Dated: May 6, 1953.

FINK, LEVINTHAL & KENT,
/s/ By LEON E. KENT. [95]

Affidavit of Service by Mail attached. [96]
[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the clerk of the above entitled court and to the plaintiff, Marie Ballentine, as guardian of the estate of Stephen William Ballentine, and to Fink, Levinthal & Kent and Leon E. Kent, her attorneys:

Notice Is Hereby Given that Marie DeSylva, defendant herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that portion only of that judgment entered

herein on April 29, 1953, wherein said judgment includes and makes a part thereof the following portion of the Conclusions of Law made by the Court herein:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Dated this 18th day of May, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PATRICK D. HORGAN,
Attorneys for Defendant. [97]

Affidavit of Service by Mail attached. [98]

[Endorsed]: Filed May 19, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 111, inclusive, contain the original Complaint; Notice of Hearing of Motions to Dismiss the Complaint; to Strike Certain Matters from the Complaint and for Enlargement of Time; Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss; Order Denying Defendant's Motion to Dismiss; Answer; Notice of Motion for Summary Judgment, Plaintiff's; Affidavit of Leon E. Kent in

Support of Plaintiff's Motion for Summary Judgment; Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment; Statement of Undisputed Facts; Stipulation re Statement of Facts; Notice of Motion for Summary Judgment, Points and Authorities and Affidavit in Support; Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Defendant's; Affidavit of Leon E. Kent in Opposition to Defendant's Motion for Summary Judgment; Memorandum re Motions for Summary Judgment; Findings of Fact and Conclusions of Law on Summary Judgment; Judgment; Notice of Appeal, Plaintiff's; Notice of Appeal, Defendant's; Designation of Contents of Record on Appeal and Statement of Points, Plaintiff's; Designation of Additional Portions of Record on Appeal; and Designation of Contents of Record on Appeal and Statement of Points, Defendant's, which constitute the transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, one-half of which has been paid by each of the parties.

Witness my hand and the seal of said District Court this 18th day of June, A.D., 1953.

[Seal] EDMUND L. SMITH,
Clerk
/s/ By THEODORE HOCKE,
Chief Deputy

[Endorsed]: No. 13880. United States Court of Appeals for the Ninth Circuit. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellant, vs. Marie DeSylva, Appellee. Marie DeSylva, Appellant, vs. Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: June 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13880

MARIE BALLENTINE, as Guardian of the Estate of STEPHEN WILLIAM BALLENTINE,
Appellant and Cross-Appellee

vs.

MARIE DeSYLVA,
Appellee and Cross-Appellant

STATEMENTS OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes Now appellant and cross-appellee herein and states that she intends on her appeal in the above entitled cause to rely on the following points as error:

1. That the Court erred in finding that an accounting by defendant with respect to the copyrights and renewals thereof on decedent's musical compositions, as well as moneys received therefrom, is not necessary. (Finding VIII.)

2. That the Court erred in finding that the defendant is the sole owner of the right to renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest. (Finding IX.)

3. That the Court erred in holding that so long as defendant, Marie DeSylva, is alive, said defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, Deceased, had an interest in accordance with Section 24 of Title 17, United States Code.

4. That the Court erred in holding that plaintiff herein had no right to an accounting from defendant for moneys or benefits obtained as a result of renewals and extensions of copyrights obtained by defendant, and the further holding that plaintiff was not entitled to an accounting of any such renewals or extensions of copyrights in the future so long as said defendant is alive.

5. That the Court erred in rendering judgment for defendant.

6. That the Court erred in failing to rule that plaintiff was at least equally entitled with defendant to the renewals and extensions of copyrights in which George G. DeSylva had an interest, which renewals and extensions were effected after his death.

7. That the Court erred in failing to rule that plaintiff was entitled to an accounting from defendant in connection with such renewals and extensions of copyrights obtained by defendant.

8. That the Court erred in ruling that under Section 24 of Title 17, United States Code, the widow of a deceased author is entitled to the renewals and extensions of copyrights owned by said author, where such renewals and extensions are effected after the death of the author, to the exclusion of children of the author, and that the children of the author are not entitled to share in such renewals and extensions so long as the widow is alive.

Dated: June 30, 1953.

FINK, LEVINTHAL & KENT
/s/ By LEON E. KENT,
Attorneys for Appellant
and Cross Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1953. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF PORTIONS OF RECORD TO BE PRINTED

To the clerk of the above entitled court, to appellee and cross-appellant, and to Messrs. Pat A. McCormick and Patrick D. Horgan, attorneys for appellee and cross-appellant:

You, and Each of You, Will Please Take Notice

that appellant and cross-appellee herein designates those portions of the record herein which appellant believes necessary for the consideration of the points on which appellant intends to rely on her appeal in the above entitled action.

Reference is to pages as designated in the record as prepared by the Clerk of the United States District Court herein.

1. Complaint, pp. 2-6 inclusive (omitting, however, the exhibit to the Complaint, pp. 7-12 inclusive).

2. Answer, pp. 38-41 inclusive.

3. Motion of defendant to dismiss the Complaint. (Appellant requests that there be printed only the actual motion to dismiss, consisting of lines 1-7 of defendant's motion No. 1, pp. 13 and 14 only).

4. Plaintiff's Memorandum of Points and Authorities in opposition to defendant's motion to dismiss. (Appellant requests that there be printed only that portion of said Memorandum beginning on line 23 of p. 32 to and including line 24 of p. 34, and that the balance of said Memorandum be omitted from the printing.)

5. Order denying defendant's motion to dismiss, p. 37.

6. Plaintiff's motion for summary judgment, p. 42.

7. Affidavit of Leon E. Kent in support of plaintiff's motion for summary judgment, pp. 44-47 inclusive.

8. Stipulation re statement of facts, dated January 20, 1953, p. 59.

9. Statement of undisputed facts by plaintiff, dated March 2, 1953, p. 56.

10. Defendant's notice of motion for summary judgment, dated March 12, 1953, pp. 63-65 inclusive.

11. Affidavit of Leon E. Kent in opposition to defendant's motion for summary judgment, dated April 17, 1953, p. 64.

12. Findings of Fact and Conclusions of Law on summary judgment, pp. 89-92 inclusive.

13. Judgment, pp. 93 and 94.

14. Notice of Appeal by plaintiff, pp. 95-96 inclusive.

15. This designation and any all counter-designations and orders filed or entered in connection with the designation of portions of the record herein to be printed.

16. Statement of points on which appellant intends to rely on appeal.

17. Certificate of Clerk.

Dated: June 30, 1953.

FINK, LEVINTHAL & KENT

/s/ By LEON E. KENT,

Attorneys for Appellant and Cross-Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1953. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH CROSS-APPELLANT INTENDS TO RELY ON APPEAL

Comes Now Marie DeSylva, appellee and cross-appellant herein and states that she intends on her cross-appeal to the United States Court of Appeals for the Ninth Circuit to rely on the following point only as on said cross-appeal:

1. That the United States District Court erred in making its following Conclusion of Law:

> "(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Dated: This 25th day of June, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PAT A. McCORMICK,
Attorneys for Appellee and
Cross-appellant Marie DeSylva

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION BY CROSS-APPELLANT OF PORTIONS OF RECORD TO BE PRINTED

To the clerk of the above entitled court, to appellant and cross-appellee, and to Messrs. Fink, Levinthal and Kent, attorneys for appellant and cross-appellees:

You, and Each of You, Will Please Take Notice that Marie DeSylva, appellee and cross-appellant herein designates those portions of the record herein which cross-appellant believes necessary for the consideration of the point on which said cross-appellant intends to rely on her cross-appeal to the United States Court of Appeals for the Ninth Circuit.

References to pages herein are to those pages as designated in the record as prepared by the Clerk of the United States District Court herein:

1. Complaint, pp. 2-6 inclusive (omitting, however, the exhibit to the complaint, pp. 7-12 inclusive).

2. Answer, pp. 38-41 inclusive.

3. Motion of defendant to dismiss the complaint. (Cross-appellant requests that there be printed only the actual motion to dismiss, consisting of lines 1 to 7 of defendant's motion Number 1, pp. 13 and 14 only.)

4. Order denying defendant's motion to dismiss, page 37.

5. Plaintiff's motion for summary judgment, page 42.

6. Affidavit of Leon E. Kent in support of plaintiff's motion for summary judgment, pp. 44-47 inclusive.

7. Statement of facts dated January 20, 1953, page 59.

8. Defendant's notice of motion for summary judgment, pp. 60 and 61.

9. Affidavit of Pat A. McCormick in support of defendant's motion for summary judgment, pp. 63-65 inclusive.

10. Findings of Fact and Conclusions of Law, pp. 89-92 inclusive.

11. Judgment, pp. 93 and 94.

12. Notice of Appeal by plaintiff, pp. 85-96, inclusive.

13. Defendant's Notice of Appeal, pp. 97-98 inclusive.

14. This designation and any and all counter designations and orders filed or entered in connection with the designation of portions of the record herein to be printed.

15. Statement of points on which cross-appellant intends to rely on appeal.

Dated: This 25th day of June, 1953.

PAT A. McCORMICK and
PATRICK D. HORGAN
/s/ By PAT A. McCORMICK,
Attorney for Apellee and
Cross-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. Paul P. O'Brien, Clerk.

[fol. 46] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER OF SUBMISSION—February 7, 1955

Ordered appeals herein argued by Mr. Leo E. Kent, counsel for Marie Ballentine, and by Mr. Pat A. McCormick, counsel for Marie DeSylva, and submitted to the Court for consideration and decision, with leave to counsel for the respective parties to file further memoranda within 10 days from date.

[fol. 47] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—August 25, 1955

Ordered that the typewritten opinion, and dissenting opinion of Fee, Circuit Judge, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 48] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,880

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellant,

vs.

MARIE DESYLVA, Appellee

MARIE DESYLVA, Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellee

OPINION—August 25, 1955

Appeals from the United States District Court for the Southern District of California, Central Division

Before Stephens, Fee, and Chambers, Circuit Judges

STEPHENS, Circuit Judge:

This litigation began with the filing in the United States District Court of a complaint by Marie Ballentine, as Guardian of the Estate of Stephen William Ballentine, a minor, as plaintiff, for declaratory relief against Marie DeSylva, as defendant. The defendant filed motions to dismiss the complaint, to strike therefrom, and for enlargement of time. The district court denied the motion to dismiss, and the other motions seem never to have been acted upon. The defendant answered the complaint, and in the answer herself prayed for a declaratory judgment.

[fol. 49] Upon these pleadings, together with an agreed "Statement of Undisputed Facts", "Stipulation Re Statement of Facts", and affidavits, the cause was submitted to the district court upon the defendant's motion for a summary judgment over the objection of the plaintiff. The plaintiff also made a motion for summary judgment which was not directly ruled upon. Findings of fact and con-

clusions of law, and judgment for defendant followed, to the effect that:

(1) Defendant is the sole owner of all right to renewals and extensions of all copyrights in which George G. DeSylva, now deceased, had an interest.

(2) Plaintiff is not entitled to an accounting.

The plaintiff appealed from the judgment.

The defendant appealed from that part of the judgment, as set out in her notice of appeal, to-wit, wherein said judgment includes and makes a part thereof the following portion of the Conclusions of Law made by the Court herein:

> "(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights."

Neither party makes any point on appeal as to the propriety of the district court's action in submitting the cause for a summary judgment.

In the interest of keeping the parties correctly in mind we shall, throughout this opinion, refer to the plaintiff-appellant and cross-appellee, Marie Ballentine, as the plaintiff or the plaintiff-mother, and to the defendant-appellee and cross-appellant, Marie DeSylva, as the defendant or the defendant-widow.

George G. DeSylva, who died July 11, 1950, was the author of numerous musical compositions which were copyrighted. Marie DeSylva, the defendant, is his surviving widow. Acting under claimed rights as she construed Section 24 of Title 17 United States Code, she applied for and received renewals of certain of the copyrights above referred to. Other of the copyrights will, in the future, be subject to renewal.

Marie Ballentine, the plaintiff, is the mother of her ward, Stephen William Ballentine, and George G. DeSylva was [fol. 50] his father. The parents were never married. The plaintiff brought the action for a declaratory judgment praying for an adjudication that the child together with the widow as a class, possesses the right to copyright renewals and that the widow, having acted to acquire and having ac-

quired renewals, must account to the child as to benefits received and also account upon future receipts of benefits.

The defendant widow disagrees with the plaintiff mother, and contends that her rights are not in a class with those of the child but are in a preferential class. She also contends that, under the applicable sections of the copyright statute the rights given to "children", as that word is used in the statute, encompass rights to legitimate children only.

The trial judge, in his Findings of Fact and Conclusions of Law, determined that Stephen William Ballentine was the "child" of George G. DeSylva under the applicable section of the copyright law, in conformity with the plaintiff-mother's claim, but construed the copyright statute as providing that the surviving widow, the defendant, has a preferential right over the child. Under such construction, the judgment went for the defendant widow in accordance with her claim that she has the first right and, consistently, no accounting was required.

Is The Widow in a Class with the Child?

We turn directly to the statute, Title 17 U.S.C.A. § 24, which reads in part:

> "That * * *, the author of such work, if still living, or the widow, * * * or children of the author, if the author be not living, or if such author, widow, * * * or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *." (July 30, 1947, c. 391, § 1, 61 Stat. 652) [fn]

Without § 24, the author's work automatically would enter the public domain upon the expiration of the original copyright term. Under the Act including § 24, the original copy-[fol. 51] right and its ownership, upon expiration of the term of the copyright, is dead; but a new copyright may issue. And it may issue only to and upon application of certain persons who fall into several different categories, as to preference. In this manner the Congress has acted to extend the benefits of the author's work beyond the origi-

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[fn] For history of § 24, see "Historical Note" following § 24 of Title 17, U.S.C.A.

nal copyright term to the author and after his decease to persons who are the natural objects of the author's bounty, and if none, to others under the formula of the Act. The right, sometimes called the renewal right, after the author's death goes directly, and not by the inheritance, to indicated members of his family who survive him. If none of the family survives him and there is a will, the right to act goes to the person or persons whom the author has designated as executors. If there is no will and no surviving member of the immediate family, then to the next of kin. The unexercised right itself never goes into a deceased person's state as property. As to the assignment of expectancy of right of renewal, see *Edward B. Marks Music Corp* v. *Jerry Vogel Music Co.*, SD. NY., 1942, 47 F.Supp.490; *Carmichael* v. *Mills Music*, SD.,N.Y.,1954, 121 F.Supp. 43.

It is the logic of the plaintiff-mother that the children of the author are as definitely objects of the author's natural bounty as the widow, and, consistent with the purposes of the Act, that the phrase, "or the widow, * * * or children of the Author", does not mean *either the widow or the children*, the one to the exclusion of the other, but means both together as one classification. She supports her contention by pointing out that there is in the Act a qualifying phrase between each of the enumerated classes which are entitled to the right. Thus, the *author* is entitled to the renewal, and then follows the qualifying phrase, "if [he is] still living"; next the *widow or children* are entitled to the renewal, and then follows the qualifying phrase, "if the author be not living". It will be noticed that in the Act there is no qualifying phrase between "widow, * * * or children of the author" to separate the one from the other as separate enumerated classes. By the structure of the Act it would follow that the widow with the children constitute one inseparable class. There is much to commend the logic of this construction. It is not illogical to grant the renewal right to the author, but after his or her decease to the family as a group, mother and children or father and [fol. 52] children, for the family's benefit. There is merit in the plaintiff-mother's view point that the defendant-widow, who in this case is not the mother of the subject child, is not in a class separate from and exclusive of the

author's children, else there would have been a separating phrase in the Act such as, "or if the widow is not living, then the children".

The mother, acting for and in the interests of the boy, points out that an early draft of the Copyright Act had in it such a qualifying phrase, but that the phrase was dropped in the draft adopted, and she argues therefrom that the Congressional intent was to place the surviving spouse and children in a class together as those first entitled to the renewal of the copyright after the death of the author. She also points to Circular 15 of the Copyright Office,[1] as sus-

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[1] "The following persons are entitled to claim a renewal copyright:

"1. Aside from the groups of works mentioned in paragraph 2, below, renewal copyrights in all works (including works by individual authors which appeared in periodicals or in cyclopaedic or other composite works), may be claimed by the following groups of persons:

"a. The author of the work, if he is still living at the time when renewal is sought.

"b. If the author is not living, his widow (or widower), or children may claim renewal.

"c. If neither the author, his widow (or widower), nor any of his children are living, and the author left a will, the author's executor may claim renewal.

"d. If the author died without leaving a will, and neither his widow (or widower) nor any of his children are living, his next of kin may claim renewal." [Emphasis added] Circular 15 of the Copyright Office, entitled "Instructions for Securing Registration of Claims to Renewal Copyrights" excerpt as quoted by plaintiff-mother (appellant) in her opening brief, p. 9, note 7.

The above statement is consistent with the letter of Mr. George D. Cary, Principal Legal Advisor to Copyright Office, which letter constitutes note 8 on page 10 of appellant's (plaintiff-mother's brief. We have not considered

taining the interpretation she contends for. An excerpt from it is quoted in the margin in footnote 1.

[fol. 53] Returning to the construction of the Act, we read it as providing for a new right by the renewal of the copyright. First, the author may act under the right. Next, but after the author's death, either the widow or the children are free to act. And it is highly important to observe that the "right" of the renewal never goes into an estate of a decedent. If not acted upon, the right dies. And the possession of the right is provided for in the Act and is not dependent upon or fixed by the law of descent.

But if we are to assume that the Congress meant to prefer one or the other, which one, the children or the spouse, is preferred? Can it be that the one who acts first gets the prize? We know of no language construction in English or in the law which confers a right over another merely because one is first named in a category of two or more, each of which is [fol. 54] separated by a disjunctive. We think the right to

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this letter, since the record is not clear that it was in evidence. We do not take judicial notice of it.

Both sides concede that there are no decided cases upon the point, and the mother is right in asserting, at page 9 of her opening brief:

> "In the absence of direct case authority, the construction [by] those charged with the duty of executing the statute is entitled to persuasive weight and ought not to be overruled without cogent reasons."

See Tennenbaum, Practical Problems in Copyright, CCH Law Handybook—7 Copyright Problems Analyzed (1952), pages 7, 12:

> "Whether the widow takes precedence over the children in renewing the copyright has not been adjudicated, although this question is constantly troubling the Copyright Bar. The sound and only proper view is that the widow and children are members of the same class, any member of which can apply for the renewal and obtain legal title to the renewal, but he will be deemed a trustee thereof for the other members of the class. If it were the intention to give the widow precedence over the children, the Act would have so

the renewal is granted to the class through action by the surviving *spouse or children.*

Here there is not a designation of one over the other, and the word "or" is given its full disjunctive meaning. The Act does not say, as contended by the widow, that upon the author's death the widow may act and if the widow is dead the children may act; it plainly says that *either* may act if the author (husband-father) dies. And it would be entirely out of the beneficent purpose of the Act to construe it as providing that when either acts, the other is cut off. It would seem reasonable to say that if additional words must be added to construe the sentence so as to fit either contention made by the parties, words should be added which best place the Act in implementation of its purposes.

Defendant widow cites the case of *Travers* v. *Reinhardt*, 1907, 205 U.S. 423, as a case wherein the court, in a situation said to be "in much the same circumstances" as in our case, refused to construe the word "or" as "and", as she argues must be done in our case if the widow with the child constitute one class. The circumstances in the cited case, as it seems to us, were very different from those of our case. In

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stated. The section would then have read, that the widow could renew, if the author is not living, or if neither the author or widow is living, then the renewal should be by the children.

"The injustice of holding otherwise is evident in the case where an author has been married several times and was survived by children by a prior marriage.

"Could it be said that the Act intended that the wife who was the widow at the death of the author should take the entire renewal to the exclusion of the children by a prior marriage? Where the widow and several children survive, and one child files a renewal, he holds the legal title for himself as trustee for the widow and each of the other children."

See, also, 2 Warner, Radio and Television Rights, 246, Sec. 81; 2 Socolow, The Law of Radio Broadcasting, page 1218. Compare Silverman v. Sunrise Pictures Corp., 1921, 2 Cir., 273 F. 909, 912, cert. den. 262 U.S. 758, 43 S.Ct. 705, 67 L.Ed. 1219.

the cited case a testator in a codicil or will used the phrase "without leaving a wife or a child or children". It was claimed that the testator meant without leaving a "wife *and* child". The argument was that the testator intended his real estate to descend through the line of his sons. The court held that it saw nothing in the circumstances to indicate any intention to use the word in any but the disjunctive sense. We do not think the case is persuasive to defendant's point.

And we say the same for another case treated in the brief: *Silverman* v. *Sunrise Pictures Corp.*, 1921, 2 Cir., 273 F. 909. Therein the court says:

> "The purpose * * * is to give to the persons *enumerated* in the order of their *enumeration* * * * a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." [Emphasis added]

But the order of *enumeration* is not necessarily the right of the widow over the right of the children for, as pointed out [fol. 55] above, the second enumeration would seem to include both as a class with the privilege of *either* widow *or* children to act for both. See *Silverman* v. *Sunrise Pictures Corp.*, 1921, 273 F. 909. And certainly, both can be properly expectant of the author's bounty, and in many states including California parents are legally liable to support their children.

The defendant widow cites Vol. 18 *Corpus Juris Secundum* 204, wherein it is stated at §79 in the text, that the renewal of the copyright is in:

> "* * * the author, if living, or in the author's widow, widower, children, executors, or next of kin, *in the order stated* * * *." [Emphasis added]

This text is a carry-over from Vol. 13 *Corpus Juris* 1090, §239. It will be noticed that the text of the statute is not quoted. The commentator (in *Corpus Juris Secundum* and in *Corpus Juris*, supra) entirely misses a correct statement which gives rise to the issue in the instant case, by omitting the "or" which, in the statute, is between the words "widower" and "children", and by omitting the word

"then" just before referring to "executors". The commentator gives no meaning whatever to the qualifying phrases. The subject sentence reads:

> "* * * the author of such work; if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * *." Title 17 U.S.C.A. §24, Copyrights.

It is clear that the commentator followed his preconceived meaning of the Act, rather than the text of the Act. Then, upon such preconceived idea, he completely omits any mention of the fact that there is an intervening qualifying phrase between all of the categories except the category which includes both spouse and children. The absence of the qualifying phrase between "widow, widower" and "or children of the author" indicates, we think, rather plainly that the expression in the Act, "widow, widower, or children [fol. 56] of the author", is one inseparable category or enumeration of the several persons who are given the right of renewal. But the commentator by his own boot-straps interpolates his own phrase "in the order stated", citing only *White-Smith Publishing Co.* v. *Goff*, 1911, 1 Cir., 187 F. 247.

The text in Vol. 34 *American Jurisprudence* 423, §32, is much the same, though the phrase "in the order named" is not used; however, the expression that the right goes to those "in the order of enumeration" is used. We have hereinbefore treated that expression. There is no decided authority cited.

Margaret Nicholson, in her "*A Manual of Copyright Practice*" (1945), interpolates, but without analysis or authority, at page 195:

> "The publisher may renew the copyright in the name of the widow or widower, *if* there is one; of the child or children, *if there is no widow or widower* * * *." [Emphasis added].

No place in the statute is there any such phrase, "*if there is one*", nor is there any such phrase as "*if there is no widow or widower*". These phrases are mere additions to the statute to support the commentator's opinion. There is no showing whatever as to the course of reasoning followed in arriving at such opinion.

To the same effect are the following: "*Risks and Rights in Publishing, Television, Radio*" etc., by Samuel Sprigg; "*An Outline of Copyright Law*" (1925 by Richard C. De Wolf; 28 *Op. Attys. General* 162, Ass't Attorney General Fowler.

We conclude that the word "or" between the words "widower", "children", must be construed as expressing the alternative and means that either one or the other may act for the family which consists of the widow (or widower) and all of the children. See *Pierpont* v. *Fowle*, 19 Fed. Case No. 11,152.

Is the Illegitimate Child Excluded From All Rights Under the Renewal Privileges of the Copyright Act?

Since we have determined that the right of renewal of the copyright of a deceased author is in the class designated in the Act as "widow, widower, or children", and such renewal is for the benefit of the surviving spouse and children [fol. 57] together, we must determine whether in our case the son of the author, having been born outside of wedlock, qualifies as a "child" under the meaning of the Copyright Act. The trial court found, as we have said, that the subject illegitimate child does so qualify. The finding is quoted in the margin.[2]

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[2] "IV. That decedent during his lifetime acknowledged in writing that plaintiff, Stephen William Ballentine, was his child; that said acknowledgments were made before witnesses and constitute acknowledgments within the meaning of Section 255 of the Probate Code of the State of California." Findings of Fact and Conclusions of Law on Summary Judgment, Record p. 29. And the trial court made a Conclusion of Law, as follows:

"(2) That Stephen William Ballentine is a child of George G. DeSylva, deceased, within the meaning of the statutes of the United States relating to copyrights." Ibid, p. 32.

In approaching the problem just stated, it will be well to have clearly in mind the fact that the right conferred by the Copyright Act is not a renewal or extension of a property which descends in an estate but is a new, personal grant of a right. Such right is a newly granted and created one, without which or without action under it, the work of the author would enter the public domain.

In both the common law and the civil law, the legal rights and privileges of the child born out of wedlock were severely restricted. He occupied a status in social relation to others tainted with disgrace as the product of shame. As time went on, the harshness accorded the child softened, but has never been completely eliminated." Convention is based upon a phase of common opinion more or less reasonable at a given time, but sometimes persists under the illogic of prejudice long after the reason for it has expired.

Both Blackstone and Kent state that the common law legal restrictions upon illegitimate children are in relation to property inheritance and to qualification to hold church office.[3]

The English law as to property inheritance became a part of the basic law of the United States, but since our Con- [fol. 58] stitution provided for the complete separation of Church and State, the restrictions as to church offices were foreign to our system of government.

Without going into detail as so many opinion writers have done resulting in considerable confusion and inconsistencies, it suffices to say that the very old English law shut out illegitimates from inheriting from either parent, but later the law allowed them to inherit from the mother only. Such was the common law of England and her American colonies, and continued as to the basic American law after Independence. This is not to say, however, that the English common law as of the date of our Independence was from that date static. On the contrary, it continued to change as it had done through the years in its original

[3] See Blackstone (1 Bl. Comm. New Ed., 1825) 492; Kent, Commentaries on American Law (11 Ed., 1867) Vol. 2, p. 230; Ayer, Legitimacy and Marriage (1902); 16 Harv. L. Rev. 22, 23.

habitat, to meet the changes in our own civilization. The harshness of one generation may be tempered in the next by judicial cognizance of material change.

The old English rule was that the illegitimate child is the child of no one, or *quasi nullius filius*, hence is not a child at all where the word "child" or "children" is used in the devolution of real property, except in circumstances showing the opposite intention. If it may continue in this country except where modified by statute, we think there is no occasion to extend its application beyond the original purpose, and courts of both federal and state jurisdiction show a decided trend in that direction.

The old English case of *Wilkinson* v. *Adams*, 1812, 1 Ves. & Bea. 422, 462, 35 Eng. Rep. 163, 179, is cited by the defendant-appellee widow in our case as authority for the limitation put upon the meaning of the word "child". We have analyzed the argument of counsel in that case which is set out in extenso in the report and advisory opinion of three judges, and in the extensive opinion by Lord Eldon. It is held in the latter's opinion that in the construction of a will in relation to real estate, the word "child" (or children) will not be taken to include an illegitimate child unless it can be gleaned from the will itself that such was the intent of the testator. That in case such intent is found, either from direct statement or by reasonable inference, an illegitimate child does not take until and unless it has acquired through "Time and Reputation" an identity as [fol. 59] the child of the testator. The case is replete with analyses of precedent cases, several of which reveal that the judges rendered their decisions adverse to the interest of illegitimate children with great reluctance because circumstances outside the wills themselves indicated plainly that the testators meant their bounty to go to the illegitimate children. In some cases the harsh ruling was avoided through stratagem. It is interesting to note that the opinion of Lord Chancellor Eldon at the outset is specific that the point considered "regards the real estate" as the title is affected by the will. And the Lord Chancellor, in the course of his opinion, states that the limitations as to the *prima facie* meaning of the word "child" derives from Coke, and the citations are solely "Cases of Deeds". Coke, in *Co. Lit. 3b.* To the same intent is the case of

McCool v. *Smith*, 1861, 66 U.S. 459, 470. A sweeping statement used in the *McCool* case has had wide quotation, sometimes out of context. The statement is:

> "By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested."

The statement would be more accurate and would be within the issues of the case it was used in if it had had words limiting it to the statutes referring to title or succession of real property. See *Heller* v. *Teale*, 1914, 216 F. 387, 398, citing *McCool* v. *Smith*, supra.

We think these leading cases are confirmative of the theory that the limitation put upon the world "child" is based upon the importance of land titles and inheriting of land interests, that they are not properly authority for extensions of the doctrine outside the original purpose of the limitation. Since the doctrine arose from consideration of real estate transfers and succession, we see no necessity or legal propriety in holding that Congress intended, in enacting the Copyright Act, to exclude the illegitimate children of the author if the widow survived, and that such intention cannot be read from the text of the Act.[4]

The cited case appears to be contrary to the theory which we approve, as it extended the limitation to the benefit of recovery of damages.

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[4] It will be noted that there is no problem as to the identity of the illegitimate child in the instant case, as it is agreed in the "Statement of Undisputed Facts" by the parties that the child Stephen is the illegitimate child of the author and has been publicly acknowledged by the father-author as such. Record on Appeal, p. 21.

[fol. 60] It is true that it was said in the English case of *Dickinson* v. *North-Eastern Ry. Co.* 1863 9 Law Times Rep. 299, 300 (Pollock, C.B.):

> "We have no doubt that in this act of Parliament [Lord Campbell's Act, 9 & 10 Vict. c. 93], as in all others, the word 'child' means 'legitimate' child only."

In *Hutchinson Investment Co. v. Caldwell*, 1894, 152 U.S. 65, 68, the United States Supreme Court was called upon to construe the federal land preemption law. The decision was that the word "heirs" should be construed, not as those who could be heirs at common law but as those who could be heirs in the state in which the land lay. We quote from the Supreme Court's opinion in the margin.[5]

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[5] "We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the word 'heirs of the deceased preemptor', as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the lex rei sitae, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. * * *

"But it is contended that the word 'heirs' was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the situs of the land and the domicil of the owner.

"The object sought to be attained by Congress was that those who would have taken the land on the death of the preemptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. * * * If the provision admitted of more than one construction, that one should be adopted which best seems to carry

[fol. 64] In the case of *Middleton* v. *Luckenbach S.S. Co.*, 2 Cir., 1934, 70 F. 2d 326, 329, 330 the issue was whether an illegitimate child could recover for the death of its mother, and whether a mother could recover for the death of an illegitimate child under the Federal Death Act of 1920 (Title 46 U.S.C.A. §761), which provided for damage suits for the benefit of decedent's wife, husband, parent, child, or dependent relative. To the same general effect, see *Campagnie Generale Transatlantique* v. *United States*, 1948, 78 F. Supp. 797. We quote from the *Middleton* (supra) opinion in the margin.[6]

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out the purposes of the act. * * *." Hutchinson Investment Co. v. Caldwell, 1894, 152 U.S. 65, 68, 69.

"There is nothing to the contrary in McCool v. Smith, 1 Black, 459 [1861, 66 U.S. 459, 470], which was a case coming to this court from Illinois, in which it was held that the meaning of the words 'next of kin' was to be determined by the common law of England, because the common law in that regard was then in full force in that State.

"The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under section 2443, in respect of bounty lands granted to officers and soldiers of the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to inure to the benefit of the whole in such portions as they were severally entitled to by the laws of descent in the State or Territory of the decedent's domicil; and other illustrations might be given. Hutchinson Investment Co. v. Caldwell, (supra) 1894, 152 U.S. 65, 70.

[6] "[4, 5] There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view. The purpose and object of the statute is to continue the support of

[fol. 62] It is not disputed that the subject son was born an illegitimate child and as such was not entitled, under the common law, to receive property as an heir of his father unless under statutory rights. California law on the subject has been changed by Section 255 of the Probate Code to so provide. We quote in the margin.[7] The referred

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dependents after a casualty. To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent. The rule that a bastard is nullius filius applies only in cases of inheritance. Even in that situation we have made very considerable advances toward giving illegitimates the right of capacity to inherit by admitting them to posses inheritable blood. 2 Kent's Commentaries (12th Ed.) 215." Middleton v. Luckenbach S. S. Co., 2 Cir., 1934, 70 F. 2d 326, 329, 330, certiorari denied, 1934, 293 U.S. 577. See Civil v. Waterman S. S. Corp., 2 Cir., 1954, 217 F. 2d 94, wherein the doctrine of the Middleton case was reaffirmed; also Lawson v. United States, S.D., N.Y., 1950, 88 F. Supp. 706, 709, wherein the court quotes from Middleton with emphasis upon the point of dependency, as in the Middleton case. In our case, the illegitimate son is a dependent of the father and mother. See Tetterton v. Artic Tankers, Inc., E.D. Pa., 1953, 116 F. Supp. 429, 432.

[7] §255. "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or col-

to section (255) of the California Probate Code is not a legitimation statute but as the California Appellate court said in *Wong* v. *Wong Hing Young*, 1947, 80 Cal. App. 2d 391, 394, it is:

"* * * simply a statute of succession. [citing cases]."

Section 230 of the California Civil Code is an out and out legitimation statute, but legitimation under it requires the consent of the wife if the father of the child is married. The father in our case had a wife and there is no allegation or proof that she ever gave her consent to the legitimation of the subject illegitimate child. We quote § 230 in the margin.[8]

[fol. 63] We come then to the definite conclusion that the son Stephen has never been legitimated and that if the right of the renewal of the copyright is accorded only to a legitimate child, the judgment must be affirmed, not upon the ground found by the trial court, to-wit, that the widow is in a preferential class over that of the child, but because the Act does not encompass illegitimate children. We think the judgment cannot be affirmed upon such or any ground.

A most interesting case to consider in connection with this phase of our case is *Estate of Wardell*, 57 Cal. 484, decided in the January 1881 term of the California Supreme Court. The case derives from the fact that a woman failed to mention her illegitimate child in her will. The California law then (and now) authorized a woman to dispose of her property by will and she could cut off any or all of her legal heirs by her will; and it then provided, by

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lateral." §255, California Probate Code, enacted. 1931; amended by Stats. 1943, ch. 998, p. 2912. The section recast former §1387 of California Civil Code.

[8] §230. "Adoption of illegitimate child. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." [Enacted 1872]. Deering (1949) Civil Code of California, §230.

§1307 [9] of the California Civil Code, as quoted in the *Wardell* case, supra, at p. 490, that:

> "* * * when any testator omits to provide in his will for any of his *children*, or for the issue of any deceased *child*, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate." [Emphasis added] (§1307 of California Civil Code, as quoted in the *Wardell* case, supra, at p. 490)

It was found in the cited *Wardell* case, supra, that such omission by the testatrix did not appear to be intentional, and that "children" as used in the statute included those who would take as her heirs, even if they were illegitimate. [fol. 64] In *Turner* v. *Metropolitan Life Ins. Co.*, 1943, 56 Cal.App.2d 862, 865, the California Appellate court held that the words "children" in an insurance policy included illegitimate children. After discussing the common law *nullius filii* status of illegitimate children and the later modification of that ancient and harsh doctrine, the court held that the argument of counsel as to limitation upon the meaning of the word "children" would be pertinent if the pending question related to the child's right to inherit from his father, but that beneficiares under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases. (See also *Perry* v. *Manning*, 1952, (Calif.) 241 P.2d 43.) We quote from the *Turner*, supra, opinion in the margin. [10]

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[9] Enacted 1872; Repealed by Stats. 1931, p. 687, §1700 of California Probate Code. Cf. §90 of California Probate Code, enacted 1931, based on former §§ 1306, 1307, and 1309 of California Civil Code (Deering, 1944), which incorporates generally the repealed section 1307.

[10] "If, therefore, plaintiff's right of action herein depended upon his right to inherit from his father, the argument advanced by the interveners would be pertinent. But it has been definitely held in this state, as in other jurisdictions, that in such cases as this, involving the rights to

[fol. 65] The widow-defendant cites the case of *Louie Wah You* v. *Nagle*, 9 Cir., 1928, 27 F.2d 573, decided by this court in 1928. The appeal was from an order of the district court quashing a writ of habeas corpus and remanding the appellant to the custody of the immigration authorities. The appellant had alleged and claimed United States citizenship as one born of a United States citizen. The appellant was the illegitimate offspring of a Chinese woman in China and of a man who was a United States citizen. At the rele-

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the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling, that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession, and that the law of descents and distributions has no applicability to such cases. * * * As declared by section 1644 of the Civil Code:

> "'The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage in which case the latter must be followed.'

* * * and clearly the ordinary and popular sense in which the word child (the singular of children) is understood is as defined in the dictionaries, to-wit: a son or daughter; a male or female in the first degree; the immediate progeny of human parents (Webster's Dictionary); the offspring, male or female, of human parents (Standard and Oxford Dictionaries). No distinction is drawn between legitimate and illegitimate offspring. It is quite true that in the law dictionaries the technical legal definition of 'child' is restricted to conform to the common law definition, that is, to legitimate children, but * * * in construing beneficiary clauses of insurance contracts the technical definitions found in law dictionaries of the different human relationships are not controlling." Turner v. Metropolitan Life Ins. Co., 1943, 56 Cal.App.2d 862, 865.

However, Bouvier's Law Dictionary (Baldwins Student Ed., 1934) defines the word "child" as "The son or daughter, in relation to the father or mother."

vant time there was in effect Section 1993 of Revised Statutes (Title 8 U.S.C. § 6) of the United States which provided in the chapter on "Citizenship", so far as is pertinent here, that:

> "All children born out of the * * * jurisdiction of the United States, whose fathers may be * * * citizens of the United States, are declared to be citizens of the United States; * * *." (Mar. 2, 1907, c. 2534, §§ 6, 7, 34 Stat. 1229.)

This court affirmed the district court order upon the holding that the term "children" in the statute included legitimate children only under the *nullius filii* doctrine. The statute at that time contained no definition of the word or term "child" or "children". (It may be of some significance to note that the citizenship statute now contains a definition of the term "child" specifically confining the term to legitimate or legitimated children. No such change has ever been made in the Copyright Act.)

The appeal in *Ng Suey Hi* v. *Weedin*, 9 Cir., 1927, 21 F.2d 801, was of similar import and was decided a year earlier, the same judges sitting. The opinion contains reference to the *nullius filii* doctrine and to the English holding under St. 4 Geo. 11 c. 21, and to the United States State Department's holding that Section 1993 does not exclude legitimated children. The *Louie Wah You* case decided, subsequent to the *Ng Suey Hi* case, that unless the appellant had been legitimated by California law, he was not a citizen. Thus, although each of these decisions appears upon its face to be contrary to the basic reasoning that the *nullius filii* doctrine applies only to matters of inheritance, we do not think that doctrine was so squarely considered and met in either case as to require us to hold that it applies in our case under the principle of *stare decisis*.

[fol. 66] The authorities are not all in agreement. However, it cannot be denied that the harsh English common law as to illegitimates has been modified in many, if not all, of the states including the State of California, the residence of all parties here concerned.

We think and hold that since the federal statute providing for renewal of the copyright has nothing to do with in-

heritance or the succession in ownership of property, and actually provides for a new right of property which right is excluded from entering into the status of an inheritance, that there is no reason in the claimed limitation of the meaning of the word "child" or "children" to legitimates in the Copyright Act. And that these words in the Act should be given their ordinary *lice*-language meaning in the instant case.

It follows, therefore, that Stephen William Ballentine, although the illegitimate child of George G. DeSylva, the author, and of Marie Ballentine, the plaintiff-mother, and although never legitimated, is, along with the widow of George G. DeSylva, Marie DeSylva (defendant-widow), entitled to a share of the benefits derived and to derive from the copyright renewals made by the surviving spouse, or by the said child, and an accounting should be had for monies had and received.

The prayer of the plaintiff-mother of Stephen William Ballentine for a declaration of rights and for an accounting should be granted, all in accordance with the foregoing opinion.

Reversed and remanded.

[fol. 67] DISSENTING OPINION—August 25, 1955

Before Stephens, Fee and Chambers, Circuit Judges

JAMES ALGER FEE, Circuit Judge, dissenting:

This cause should be remanded to the District Court with direction to dismiss.

There is no diversity of citizenship and no suit for accounting can be entertained in the national courts between citizens of California, without more. Although it is obvious that this is not a suit for infringement, it is urged that there is jurisdiction because it is a civil action arising under an "Act of Congress relating to copyrights."

The acts of Congress which relate to this particular situation provide that a "person may attain registration of [fol. 68] his claim to copyright by complying with the provisions of this title", 17 U.S.C.A. § 11. Plaintiff has not

alleged any compliance with the provisions of the title. She is not, nor is her ward, the author or composer of the works in question. At the outside then, plaintiff claims that Stephen William Ballentine has a right to register as part owner of a renewal of a copyright. The statute in this regard provides: * * * the widow, * * * or children of the author, if the author be not living, shall be entitled to renewal * * * *when application for such renewal shall have been made* to the copyright office and duly registered therein." 17 U.S.C.A. § 24. (Emphasis added)

There is no allegation in the complaint that Stephen William Ballentine or anyone in his behalf has applied for registration of renewal or any interest therein to the copyright office. Therefore, no justiciable claim or action arising under an act of Congress relating to copyright is involved or set up.

In the second place, this failure to apply for registration indicates that Stephen William Ballentine or his guardian failed to exhaust his remedies in the administrative field, and therefore, even if there be jurisdiction, no action lies until he has applied for registration of renewal of copyright or an interest in renewal.

The jurisdiction and discretion here is committed to the copyright office, and the court should not interfere until that office has made a determination. The mere fact that plaintiff may fear that the copyright office would not grant an interest in the renewal is no reason to allow her to seek a primary remedy in the courts.

The commitment to the copyright office is positive and exclusive. The same statute provides:

> "* * * the register of copyrights * * * shall, under the direction and supervision of the Library of Congress, perform all duties relating to the registry of copyrights." 17 U.S.C.A. § 201.

As noted above, a person may obtain registration by complying with the provisions "* * * and upon such compliance the Register of Copyrights shall issue to him the certificate." 17 U.S.C.A. § 11. Under the very section [fol. 69] under which this claim is now urged in the court, it is provided, when application for such renewal shall

have been made to the copyright office "and duly registered therein", child of the author under appropriate conditions "shall be entitled to renewal." 17 U.S.C.A. § 24.

In Bouve vs. Twentieth Century Fox, D.C.Cir., 122 F.2d 51, 53, it is said:

> "It seems obvious, also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept."

The case just cited expressly holds that such discretion is not uncontrolled, but that the Register is an officer whose acts are subject to judicial review and correction (page 54).

In view of this situation, even if this Court were to reverse the decree and direct that the trial court enter a declaration that plaintiff is entitled to an interest in the copyright, the Register of Copyrights would not necessarily be bound by the determination made in a proceeding where his act was not subject as yet to judicial review. Probably, if Stephen William Ballentine filed an application in accordance with the statute, the Register of Copyrights might refuse to register such a claimed interest irrespective of our direction to hold any accounting. We have heretofore questioned the right of administrative bodies to refuse to follow our opinions. But the cure for that is not to make determination until the administrative process is finished. In such a case, review can be had under the Administrative Procedure Act after final action has been taken. What the guardian is asking is that she win the case before it is commenced.

Mr. Justice Jackson said in Public Service Commission vs. Wycoff Co., 344 U.S. 237, that judicial pronouncements under such circumstances are improper:

> "* * * the courts * * * must be alert to avoid imposition upon their jurisdiction through obtaining * * * premature interventions especially in the field of public law." Page 244.
>
> "* * * the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body. * * * Responsibility for effective functioning of the

[fol. 70] administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." Page 246.

A clear statement of the situation in which the court would find itself is found in Minneapolis Grain Exchange vs. Farmers Union Grain Terminal Association, 75 F. Supp. 577, 582:

> "* * * the decision of this Court will not be final because of certain exclusive powers possessed by the administrative agency, it seems only wise and just, as well as realistic, that this Court should refer the matter to the administrative agency by declining to grant a declaratory judgment."

The grants of patents and of copyrights stem from the same clause of the Federal Constitution:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, Sec. 8.

It is obvious that, under the patent section, one can bring an action for infringement. But the writer has never found or heard of any case wherein one claiming to be the joint inventor was allowed to bring suit against the person who had obtained the patent without proceeding in the patent office. Finally, a suit for accounting will not lie, generally speaking, between joint owners of a patent even though their rights have been established by the grant. This is a matter of substantive law. In Talbott vs. Quaker State Oil Refining Co., 3 Cir., 104 F.2d 967, a joint owner of a patent granted license without obtaining consent of his joint owner. It was there held that accounting would not be allowed and that the holding of the state court that one co-owner had licensed the use of the patent to another without consent of the other owner was res adjudicata and therefore no suit lay for infringement of the license. It has been held that the granting of a patent to two persons vests each with an undivided half interest, creating the relation of co-tenants between them, so that each becomes

entitled to use the invention without accounting to the other. Drake vs. Hall, 7 Cir., 220 Fed. 905, 906; Blackledge vs. Weir & Craig Mfg. Co., 7 Cir., 108 Fed. 71, 76. The same principles had been previously applied specifically to copyrights [fol. 71] in the case of Carter vs. Bailey, 64 Maine 458, 463. This last case was tried in the state court.

It would seem that these matters are conclusive upon us and that there was no ground whatsoever of jurisdiction until the statutes had been complied with and the copyright office had either granted or refused registration of the interest of Stephen William Ballentine in the renewals.

Furthermore, it seems that, if the best face is put upon the matter, still the complaint does not state a claim upon which relief can be granted or, as we used to say, there is no cause of action set up. In any event, I think it was an abuse of discretion for the trial court to attempt to give declaratory relief in a field so beset with questions going to the primary right as this. 28 U.S.C.A. Section 400.

The opinion of the majority passes these matters over without consideration. If the direction to the trial court be carried out and an accounting had, this whole series of questions can be raised. Proper administration indicates that, since the administrative process plays such a great part in modern governmental structure, the courts should not encroach upon the severely limited field in which such bodies operate. Salmon Bay Sand and Gravel Co. vs. Marshall, 9 Cir., 93 F.2d 1; O'Leary vs. Dielschneider, 9 Cir., 204 F.2d 810. But it is a useless gesture to direct the trial court to hold an accounting. After trial is had these questions can all again be raised by either party. There is no security in judgment, even when it has attained apparent finality. Rights should not be declared under Federal Declaratory Judgment's Act unless the determination will be of practical help in ending the controversy.

[fol. 72] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,880

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellant,

vs.

MARIE DE SYLVA, Appellee

MARIE DE SYLVA, Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine, Appellee

JUDGMENT—August 25, 1955

Appeals from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that said cause be, and hereby is remanded to the said District Court with directions to proceed in accordance with the opinion of this Court, with costs in this Court in favor of the appellant Marie Ballentine and against the appellee Marie DeSylva.

It is further ordered and adjudged by this Court that the appellant, Marie Ballentine, recover against the appellee, Marie DeSylva, for her costs herein expended and have execution therefor.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed January 9, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6657-1)